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STATUTES

MISCELLANEOUS

No. 92-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RUTH O. SHAW, *et al.*,

Appellants,

v.

WILLIAM P. BARR, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

INTEREST OF AMICUS CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("the Fund") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S.

*Letters consenting to the filing of this brief have been filed with the Clerk of Court.

415, 422 (1963). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. *See, e.g., Houston Lawyers Ass'n v. Attorney General of Texas,* 111 S.Ct. 2376 (1991); *Chisom v. Roemer,* 111 S.Ct. 2354 (1991); *Thornburg v. Gingles,* 478 U.S. 30 (1986); *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977).

SUMMARY OF ARGUMENT

This case raises critically important issues about the scope of a state's authority to remedy race-based voting discrimination to comply with the Voting Rights Act, 42 U.S.C. §1973, as amended in 1982. At the outset, however, it is important to clarify what this case is *not* about. This case does not present a question about the State's failure to comply with a remedial directive by the Attorney General. There is no dispute that the state action challenged by appellants was taken at the suggestion of the United States Attorney General and was subsequently approved by the Attorney General. Letter from Assistant United States Attorney General for Civil Rights, John Dunne, to Tiare B. Smiley, North Carolina Special Deputy Attorney General, of 2/6/92 at 2.

The question raised by this case is whether a state constitutionally may use race-conscious measures to preserve minority voting strength. Under this Court's decisions in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)("*UJO*") *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *City of Rome v. United States*, 446 U.S. 156 (1980); *City of Richmond v. United States,* 422 U.S. 358 (1975) and *United States v. Beer*, 425 U.S. 130 (1976), a state unquestionably can. These cases were correctly decided and govern the disposition of this case, requiring affirmance of the judgment below.

In reality, redistricting cannot be "race-neutral". By its very nature, drawing lines to allocate political power requires classification of people according to group

characteristics, whether social, political, economic or racial. Those who draw political boundaries inevitably are aware of, and take into account, the race and other demographic characteristics of their constituents.

The core principles enunciated in *UJO* and the other cases cited above have continuing validity. As long as it does not use race invidiously to cancel out the voting strength of nonminority groups, a state constitutionally may act to ensure equal electoral opportunity for minority voters by creating districts in which they constitute the majority of the voting age population ("majority minority districts"). Such actions by the state are not prohibited by, and in fact are wholly consistent with, the critical national policy, as expressed in the Voting Rights Act, of eradicating race-based voting discrimination. The Court's recent decisions involving race-conscious measures do not require a different result.

Because of the statutory single-member district requirement for congressional elections,[1] the only way to effectuate the equal participation guarantees of the fourteenth and fifteenth amendments in the context of congressional elections is through the creation of majority minority districts. Moreover, there is no cognizable harm suffered by nonminority group members included within fairly drawn majority minority districts.

A prohibition against considering race in redistricting, while permitting the consideration of a host of other factors, would itself violate the fourteenth and fifteenth amendments. Such a prohibition would impose substantial and unique burdens on racial minorities in the redistricting process and would inhibit their ability to have a fair opportunity to elect representatives of their choice.

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[1] *See* 2 U.S.C.A. §2c.

ARGUMENT

Introduction

For nearly one hundred years, African American voters had no opportunity to participate equally in the political process and no African American was elected to Congress from the State of North Carolina. In 1992, following the decennial reapportionment and the creation of two majority African American congressional districts, North Carolina sent its first two African American representatives since Reconstruction to Congress. The reapportionment plan that created these two districts is at issue in this case.

North Carolina has a long history of racial discrimination in voting. It was the subject of the landmark decision, *Thornburg v. Gingles*, 478 U.S. 30 (1986), in which this Court upheld findings of extreme racial bloc voting and vote dilution in the State's legislative districts.

After a finding that the State had used racially discriminatory voting tests and devices leading to depressed minority voter registration and participation levels, forty of North Carolina's one hundred counties were designated for preclearance under section 4(e) of the Voting Rights Act. As a "covered jurisdiction", North Carolina was required to submit its congressional reapportionment plan to the United states Attorney General for preclearance.

The congressional reapportionment plan originally submitted by the state contained one majority African American congressional district. A-3a.[2] The Attorney General lodged a section 5 objection to this plan because it was dilutive of African American voting strength, noting that state authorities could have created an additional majority minority district. As evidence of this conclusion, the

[2]*See Shaw v. Barr*, C.A. No. 92-202-Civ-5-BR, slip op. at 13a (E.D.N.C. Aug. 7, 1992). The trial court opinion, from which most of this factual discussion is drawn, is found in the Appendix to Appellants' Jurisdictional Statement. (U.S. App.)

Attorney General noted that it would have been possible to draw an additional combined majority African American and Native American district in the Southeastern portion of the state. Acting to cure the section 5 objection, the North Carolina General Assembly drew another reapportionment plan that contained a majority African American district in the center of the state. A-4a.

This brief will not address in detail the particular facts and circumstances of the North Carolina case. Nor will it discuss a covered state's duty under the Voting Rights Act once the Attorney General has found that the state's congressional reapportionment plan violates section 5. Amicus takes the position that once a covered state's reapportionment plan is found to be in violation of section 5, the state must remedy the violation. In its attempt to purge itself of the objection, the state enjoys great latitude. Neither the language of the statute, *see* 42 U.S.C. §1973c, the Attorney General's section 5 regulations, *see* 28 C.F.R. 51.44, nor case law, *see Wise v. Lipscomb*, 437 U.S. 535-41 (1978); *Connor v. Finch*, 431 U.S. 407, 414-415 (1977) and *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) requires a state to adhere specifically to any particular remedial plan. In reviewing the state's remedial plan, the Attorney General's inquiry is limited to whether the plan cures the basis for the objection, not whether the state adopted one or another remedy proposed in the Attorney General's comments.[3] As long as the state's remedial plan corrects the violation without fencing nonminority groups out of the political process, it passes muster under the Voting Rights Act and the Constitution. Indeed, under the decisions of this Court,

[3]Indeed, in this case, the Attorney General's objection letter does no more than identify, as evidence of discrimination, one possible alternative to the configuration adopted by the state that included two districts. Nowhere does the letter suggest that the Attorney General intended to require adoption of the particular district that was identified in the objection letter. And indeed, the Attorney General approved the second plan which did not contain the referenced district.

even in the absence of a violation, a state may act voluntarily to avoid dilution of minority voting strength. *UJO*, 430 U.S. 144.

We address here the argument made by petitioner and some of their *amici* that previously settled law should be *changed* - specifically, that the Constitution requires what they call "race-neutral" districting and that *UJO v. Carey* should be overruled.

I. APPELLANTS' PROPOSED REQUIREMENT OF "RACE-NEUTRAL" DISTRICTING IS INCAPABLE OF REALIZATION

A. Legislatures Cannot Draw Electoral Districts Without Taking Race Into Account

The term "race-conscious districting" purports to describe the process whereby minority voters are aggregated into majority minority districts to create an opportunity for these voters to elect a preferred candidate. When the election system in a jurisdiction is arranged to include some districts in which the minority group predominates, the racial majority group in the jurisdiction cannot control the election of *all* representatives as it would if elections were conducted at-large in a winner take all system, or solely in districts in which the majority predominated. *See* Guinier, "The Representation of Minority Interests: The Question of Single Member Districts," 14 *Cardozo L. Rev.* 1001 (1993).

However, the term "race-conscious" is misleading in that it falsely suggests that there is such a thing as "race-neutral" districting. Appellants' proposed requirement of "race neutral" districting is incapable of realization and would mask the practice of discriminating against racial minorities in the districting process.

By its very nature, redistricting is the process of aggregating people according to their group characteristics,

whether geographic, economic, social or racial. In addition, the Constitution requires that districts be substantially equal in population. It is inevitable that in the process of devising districts, a host of political or "nonneutral" considerations will affect how boundaries will be drawn. In deciding where to place the district lines, legislators decide which of several possible groups will constitute the district majority, and thus control the district. In so doing, legislators make decisions about which incumbents will be protected, which political parties will be advantaged, which political groups will be given a voice, and which communities will be advantaged by being allowed to remain whole. *Karcher v. Daggett*, 462 U.S. 725 (1983); *Gaffney v. Cummings*, 412 U.S. 735 (1973). Invariably, such decisions have obvious racial consequences to which legislators cannot close their eyes. *UJO*, 430 U.S. at 176 (Brennan, J. concurring). Three factors support this conclusion.

First, census data must be used to meet constitutional equal population standards. This data is full of explicit racial information. Moreover, computer technology makes it possible to analyze the racial and political impact of each possible redistricting choice in considerable detail in very short periods of time. *Karcher*, 462 U.S. at 752, n.10 (Stevens, J., concurring). Under these circumstances, to pretend that legislators and legislative staffs are unaware of race or national origin when they district is to wink at reality. *Cf., Alexander v. Louisiana*, 405 U.S. 625 (1972); *Castenada v. Partida*, 430 U.S. 482 (1977)(presence of data showing race or national origin sufficient to infer that information taken into account).

Second, even if racial considerations are not explicit in the districting process, there are a myriad of proxies for racial data. Minorities often are residentially segregated and share socioeconomic characteristics that define their political interests. Because of residential segregation, the precincts and wards that are the building blocs of districts often have

clearly identifiable racial characteristics.[4] *See Wright v. Rockefeller*, 376 U.S. 52 (1964). In addition to residential patterns and income, other proxies such as traditional physical barriers (such as the railroad tracks customarily found in segregated communities), and in some instances, party affiliation may be used in the districting. The existence of these proxies for race make it implausible that racial considerations will not enter the districting process either directly or indirectly. A rule that requires legislators to ignore racial considerations while taking into account any other social, political, economic and geographic attribute of minority groups ignores plain reality. Imposing such a rule would not remove racial considerations from the districting process, it simply would prevent legislators from affirmatively acting to protect minority interests in the electoral sphere.

Third, redistricting largely is driven by incumbents. *Davis v. Bandemer*, 478 U.S. 109, 147 (1986), (O'Connor, J., dissenting); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). In the context of congressional reapportionment, where incumbent state legislators draw the congressional districts, a primary motivation is maximizing the legislative influence of their parties by increasing, to the extent possible, the election prospects of fellow partisans. *See Davis, supra*. Given the known nationwide patterns of racially polarized voting[5] and

[4]"[L]ike bloc-voting by race, this too is a fact of life, well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district." *Beer v. United States*, 425 U.S. 130, 144 (1976)(White, J., dissenting).

[5]*See Beer v. United States*, 425 U.S. at 144 (White, J., dissenting); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *see also, Gomez v. City of Watsonville*, 863 F.2d 1407, 1417 (9th Cir. 1988); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989); *Ewing v. Monroe County*, 740 F. Supp. 417, 421 (N.D. Miss. 1990); *Jeffers v. Clinton*, 730 F. Supp. 196, 198 (E.D. Ark. 1989); *aff'd*, 111 S Ct. 662 (1991); *Brown v. Board of Commissioners*

high level of loyalty to the Democratic Party among African Americans, in many jurisdictions, *see e.g, Whitcomb v. Chavis*, 403 U.S. 124 (1971), it is likely that these incumbents will closely consider the impact of their line-drawing on the racial composition of their districts. Even if incumbents do not monitor the racial impact of line-drawing, but merely seek to preserve the core of their constituencies, there is likely to be a racial impact given segregated housing patterns.

B. A "Race-Neutral" Districting Requirement Would Conflict with Well-Established Principles in Reapportionment Cases and Would be Inconsistent with the Voting Rights Act

This Court consistently has recognized in its jurisprudence after *Reynolds v. Sims*, 377 U.S. 533 (1964), that state legislatures must be given room within one-person, one-vote parameters to consider and advance a variety of political and policy goals. *Brown v. Thomson*, 462 U.S. 835 (1983); *Abate v. Mundt*, 403 U.S. 182 (1971); *Mahan v. Howell*, 410 U.S. 315 (1973); *Gaffney v. Cummings*. 412 US 735 (1973); *Growe v. Emison*, No. 91-1420, 1993 WL 42842 (U.S. Minn. Feb 23, 1993), 1993)(slip op. pp.7-8). *See also, Wright v. Rockefeller*, 376 U.S. 52 (pre-*Reynolds*). Requiring the kind of highly antiseptic districting process that would be necessary to insure that racial information was not taken into account, either directly or indirectly, would unavoidably restrict legislative bodies' ability to implement these other kinds of policies. Indeed, if appellants' "race-neutral"

of Chattanooga, 722 F. Supp. 380, 393 (E.D. Tenn. 1989); *Clark v. Edwards*, 725 F. Supp. 285, 298-99 (M.D. La. 1988), *vacated sub nom. Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990), vacated and remanded, 111 S. Ct. 2881 (1991); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 593-94 (E.D. Va. 1988); *Martin v. Allain*, 658 F. Supp. 1183, 1193-94 (S.D. Miss. 1987); *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1028 (C.D. Ill. 1987).

districting approach is adopted, the only way legislatures will be able to draw plans immune from challenge is to completely remove themselves from the process and engage in computer-controlled, mathematical redistricting. Such a practice undoubtedly would run afoul of the clear *Reynolds* principle that districting is primarily a political and legislative process. *Reynolds*, 377 U.S. at 586.

For a variety of reasons, districts drawn to meet purely mathematical or "objective" criteria with no regard for racial or political impact are not a desired goal. *See Whitcomb*, 403 U.S. 124; *White v. Weiser*, 412 U.S. 783, 794-795 (1973). Such a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." *Gaffney v. Cummings*, 412 U.S. at 753. Similarly, a purportedly racially mindless approach will likely result in only whites being represented.[6] Alternatively, a purely mathematical formulation would require a state to adopt a series of district plans at random without regard to whether the lines minimize minority voting strength until it stumbles across a plan that does not have this illegal effect.[7]

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[6]Indeed, application of such a "mindless" approach in a state like North Carolina, with a history of voting discrimination, will as often as not result in only whites being represented.

[7]As (then) Circuit Judge Stevens observed in *Cousins v. City Council of the City of Chicago*:

> A test which would require legislators to act with complete indifference to the impact of districting on cognizable groups of voters is simply much too strict. It should either open the door to invalidation of all apportionment plans or require legislators to perform ridiculous charades in their public deliberations and to do their only significant work in private conference.

466 F. 2d 847, 856 (7th Cir. 1972) (Stevens, J., dissenting).

Indeed, a rule that would require each state to engage in a haphazard redistricting approach that did not take race into account, only to be sued later, would frustrate the unequivocal intent of Congress embodied in the Voting Rights Act. In passing the Act, Congress rejected, as wholly ineffective, piecemeal litigation to enforce constitutional voting guarantees. *South Carolina v. Katzenbach*, 383 U.S. at 313. Such enforcement strategies were seen as "unusually onerous," "exceedingly slow," and inconsistent with the urgent national priority to end racial discrimination in voting once and for all. *Id.*, at 314. It is completely consistent with this congressional policy to allow states voluntarily to create majority minority districts in order to comply with the requirements of the Act.

Finally, even if the districting process were left solely to the computers, courts would be required to closely scrutinize the instructions given to the computer regarding factors to consider in drawing lines to insure that neither race nor racial proxies entered into the picture. What petitioners really propose is a mechanical rule that as long as race is not *explicitly* identified as a factor in the districting process, and no majority minority subdistrict is created within an otherwise majority white jurisdiction, discrimination has not occurred. Such a rule would usher in a return to the era of "sophisticated, [not] simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 279 (1939).

II. APPELLANTS' "RACE NEUTRAL" DISTRICTING APPROACH IS INCONSISTENT WITH THE VOTING RIGHTS ACT

A. Section 5 of the Act Requires Race-Conscious Districting.

To effect compliance with Section 5 of the Act, a state must take race into account in the districting process. This Court's decisions consistently have recognized this simple principle. In *Beer v. United States*, 425 U.S. 130

(1976), the Court established an "effects" test under section 5 that required covered jurisdictions to reject reapportionment plans that "[w]ould lead to a retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Similarly, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court held that Section 5 scrutiny applied to a change from a district to an at-large system of election to ensure that minority voting strength was not diluted. 393 U.S. at 569.

In *City of Richmond v. United States*, 422 U.S. 358 (1975), the Court held that in order to avoid a violation of section 5, the City of Richmond was required to assess African American voting strength and develop a plan that fairly reflected that strength in the enlarged community following annexation. *Richmond*, 422 U.S. at 371 In *Richmond*, compliance with section 5 necessitated consideration of race and the impact on minority voting strength of proposed political boundary changes in the annexation process and affirmative action to ensure against dilution of minority voting strength. Failure to assess and fairly reflect the electoral strength of African Americans in the postannexation community would have created a violation. *Id.*

Also, in *City of Rome v. United States*, 446 U.S. 156 (1980), this Court concluded that annexations undertaken by the city violated Section 5 because "[b]y substantially enlarging the city's number of white eligible voters without creating a corresponding increase in the number of Negroes, the annexations reduced the importance of the votes of Negro citizens who resided within the preannexation boundaries of the city." *City of Rome*, 446 U.S. at 187. Underscoring the need for a jurisdiction to take race into account in changing its political boundaries, the Court held that the jurisdiction's lack of detailed information on the racial breakdown of city population left the city with no defense against a charge that the annexations violated Section 5. *Id. at 186.*

Implicit in each of these rulings is the proposition that compliance with the Voting Rights Act necessarily requires that racial considerations be examined and employed to ensure that minorities be afforded the opportunity to participate and elect their candidates of choice.

Congress was well aware that compliance with Section 5 necessarily would require a state to consider race in reapportioning its districts. In amending the Act in 1982, Congress specifically endorsed the Section 5 retrogression standard of *Beer v. United States*, with its implicit requirement of race consciousness in evaluating the impact of political boundary changes.*Id.* Congress also cited the continued gerrymandering of election boundaries to exclude African Americans from the political process as a basis for extending section 5. *S. Rep. No. 97-417, 97th Cong., 2d Sess. 6 (1982)("S. Rep.")*. Indeed, Congress expressly noted that "[t]he continuing problem with reapportionments is one of the major concerns of the Voting Rights Act." *Id. at 12 n.31.*

B. Section 2 of the Act Requires Race Conscious Districting.

Even in non-covered jurisdictions, racial data must be considered in districting because of the "effects" test adopted in the 1982 amendments to section 2. In 1982, Congress adopted the vote dilution analysis set out in *White v. Regester*, 412 U.S. 755 (1973) and *Zimmer v. McKeithen* 485 F.2d 1297 (5th Cir. 1973) expressly identifying racially polarized voting as a key factor in establishing a vote dilution claim. *S. Rep. at 29*. In *Thornburg v. Gingles*, 478 U.S. 30, interpreting the 1982 amendment to section 2, the Court identified: a) the existence of a minority group that is b) politically cohesive and sufficiently large and geographically compact as two of the three preconditions for

a finding of vote dilution under the Act. 478 U.S. at 48[8] This test requires states engaging in redistricting to consider, among other factors, the voting strength and the size and geographic concentration of minority groups in order to avoid violating section 2.

Compliance with section 2 necessarily requires states to explicitly consider race in districting matters. If they are prevented from considering racial data in the process they will be left vulnerable to attack under section 2. Such a result is fundamentally inconsistent with congressional intent. In amending section 2, Congress took into account, and rejected as unfounded, concerns raised by the Act's detractors that imposing an affirmative obligation on government to secure minority voting rights by race-conscious mechanisms was alien to this country's political tradition. See *Gingles v. Edminston*, 590 F. Supp. 345, 356-57 (E.D.N.C. 1984), aff'd, *Thornburg v. Gingles*, 478 U.S. 30 *(citing Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1351-54 (Feb. 12, 1982)(statement of Professor Blumstein), p. 509-10 (Jan. 28, 1982) (statement of Professor Erler), p. 231 (Jan. 27, 1982) (testimony of Professor Berns)*. In doing so, Congress made it inevitable that states voluntarily will use race-conscious measures to secure compliance with section 2.

C. *The Disclaimer on Proportional Representation Does Not Limit Black Electors' Opportunity.*

Appellants' argument that majority minority districts were created to ensure the election of a "quota" of minority representatives in violation of the Act's proportional representation disclaimer, wholly misunderstands the law. The Act's disclaimer provides that "nothing in this section

[8]Indeed, in *Gingles* this Court stated that one of the two most important factors bearing on Section 2 challenges is the existence of racially polarized voting. 478 U.S. at 48 n.15.

establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. This language focuses not on the minority *voter*, but on the *election of minority individuals* to office. By its plain language, the provision is a disavowal of election "quotas" for minority candidates. 42 U.S.C. Section 1973b *See S. Rep.* at 30-31(The disclaimer provision is "both clear and straightforward. . . . It puts to rest any concerns that have been voiced about electoral quotas).

The language of this provision is consistent with the Act's focus on providing the opportunity for *minority voters* to participate and elect their candidates of choice, not on guaranteeing the election of a particular number of the "members of a protected class." *Id.; S. Rep.* at 28; *Gingles*, 478 U.S. at 46. The creation of majority minority districts in proportion equal to the minority proportion of the population is not inconsistent with this provision. However, even the creation of such districts does not guarantee the election of minority representatives. Indeed, the only guarantee afforded minority voters is that they be given the opportunity to elect a candidate who is actually accountable to them—because she is dependent on them for their votes—regardless of color. *Cf. Rogers v. Lodge*, 458 U.S. 613, 623 (1988)(Racially polarized voting in an unfair electoral system allows elected officials to ignore the interests of minority constituents without repercussions).

The creation of two majority African American congressional districts out of twelve in the particular case of North Carolina does not violate the Voting Rights Act's disclaimer of guaranteed proportional representation. From a purely mathematical standpoint, African Americans do not enjoy absolute proportional representation. African Americans constitute 22% of the population of North Carolina, but have the opportunity to elect their candidates of choice in two of twelve districts, or 16.6% of the districts. Since whites are a majority in 83.4% of the districts, whites are in fact overrepresented with respect to their percentage of the state's population. The creation of two majority

African American districts out of a total of twelve does not violate the Voting Rights Act's disclaimer on proportional representation.

III. APPELLANTS' "RACE NEUTRAL" APPROACH TO REDISTRICTING IS NOT REQUIRED BY APPLICABLE CONSTITUTIONAL PRINCIPLES

A State voluntarily may use "race-conscious" measures to comply with statutory and constitutional voting guarantees and avoid abridgement of minority voting strength. *UJO, 430 U.S. 144.* Unless the districts are "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population," no constitutional injury results. *Rogers v. Lodge*, 458 U.S. at 617 (internal quotation marks omitted). *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The cases decided since *UJO*, in which this Court has struck down race-conscious remedies, are inapplicable in the context of redistricting, and thus have no impact on *UJO*. *City of Richmond v. Croson*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

In its Equal Protection jurisprudence this Court has looked at two factors in determining the permissibility of racial considerations--the strength of the State's justification for using race-conscious measures, and the nature and extent of the burdens imposed on individuals affected by the measures. Both factors support the constitutionality of taking race into account in the districting process.

A. The State's Interest In Complying with the Voting Rights Act

The Court consistently has held that overcoming the effects of past discrimination and avoiding current discrimination are sufficient governmental justifications for the employment of racial considerations. *See Swann v.*

Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *UJO, supra*. Where federal law creates a duty not to discriminate, the weight of this interest may be greater.

In the context of districting, the comprehensive remedial scheme under sections 5 and 2 of the Act creates a powerful justification for the use of race-conscious remedies. This justification arises out of the extensive findings of Congress, as recently as 1982, that racial discrimination in voting is a persistent evil that is national in scope and that ending this abridgement of a fundamental right[9] is a national priority. *See South Carolina v. Katzenbach*, 383 U.S. at 309.

Under section 5, a covered jurisdiction may not implement any electoral change, no matter how small, unless it can prove that the change will not discriminate against minority voters. *Allen v. State Board of Elections*, 393 U.S. at 566. This shift in the burden of proof was a clear expression of Congress's intent to ensure that no new voting mechanisms be used to perpetuate past discrimination. This policy alone creates a vital state interest in using race conscious measures to avoid a violation of section 5. Similarly, states not covered by section 5 have a strong interest in avoiding violation of section 2. The only way to avoid this risk is by being cognizant of race and assuring minority electors a fair opportunity to elect candidates of their choice.

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[9] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Reynolds v. Sims*, 377 U.S. at 555, 561-562 ("[T]he right of suffrage is a fundamental matter in a free and democratic society. . . . the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *Mobile v. Bolden*, 446 U.S. 55, 104-105 (1980), (Marshall, J. dissenting); *Rogers v. Lodge*, 458 U.S. 613 (1982).

This Court has upheld Congress's authority under the fourteenth and fifteenth amendments to adopt "prophylactic rules" and induce states to avoid conduct it has defined as unlawful. *E.g.*, *Croson* 488 U.S. at 490 (citing *Katzenbach v. Morgan*, 384 U.S. 641; *South Carolina v. Katzenbach*, 383 U.S. 301. Thus, specifically in the context of redistricting, a state can "take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination." *Wygant*, 476 U.S. at 291 (O'Connor, concurring)(citing *UJO*). *See also, Metromedia Broadcasting v. Federal Communications Comm.*, 497 U.S. ___, ___, 111 L. Ed. 2d 445, 473 (1990) (affirming that neither the fifteenth nor the fourteenth amendment "mandates any *per se* rule against using racial factors in districting and apportionment.")(citing *UJO v. Carey*).

B. *The Creation of Majority Minority Districts Does Not Impose A Constitutionally Forbidden Burden on White Voters*

The nature and extent of the "burden" imposed on white voters affected by the creation of majority minority districts does not violate equal protection concepts. As long as the state does not use race systematically to exclude white voters from the political process, white voters assigned to majority minority voting districts are not subject to any cognizable harm. There is no allegation in this case that white voters systematically are excluded from the political process.

The "burden" imposed on whites within majority white districts is not akin to the burdens created by the race-conscious allocation of resources that has elsewhere concerned this Court. For example, in *Wygant*, before striking down the preferential layoff policy, the Court likened white workers' expectation in job security to the value of equity in a house. It highlighted the likely disruption of this expectations in job security, noting that "layoffs impose the entire burden of achieving racial equality

on particular individuals, often resulting in serious disruption of their lives"[10];

Similarly, in *Croson*, the Court highlighted the fact that minority contractors from anywhere in the country would receive preference over whites from the City of Richmond. ("Under Richmond's [minority set-aside] scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race") *Croson*, 488 U.S. at 508; *See also*; *Metromedia*, 111 L.Ed.2d at 475 (O'Connor, J. dissenting)("The distress sale imposes a particularly significant burden. The FCC has at base created a specialized market [for broadcast licenses] reserved exclusively for minority controlled applicants. There is no more rigid quota than a 100% set-aside.")

In contrast, "race-conscious" districting does not allocate representation in a way that unfairly burdens white voters. White voters who are assigned to majority minority districts are not deprived of the right to vote, nor is the weight of their individual votes arbitrarily debased or diluted in comparison to the votes of any other voters. *Reynolds*, 377 U.S. 533. No individual voter has the right to vote for a particular candidate, nor does a voter have a constitutional claim if her candidate loses at the polls. *Whitcomb v. Chavis*, 403 U.S. at 153-154. In fact, the individual voter has no claim even if her candidate repeatedly loses--for example, when a Republican happens to live in majority Democratic district, *Cf. Davis v. Bandemer*, 478 U.S. at 109, or her party suffers crushing defeat statewide at the polls. *Id.*, at 138-140; *Whitcomb*, 403 U.S. at 154.

The white voter who is assigned to a majority minority district is in no worse a position than the minority

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[10]In *Johnson v. Transportation Agency* , 480 U.S. 616 (1987), on the other hand, the Court upheld an affirmative action plan because it was deemed not to frustrate the much lower expectation in being hired.

voter who is in a majority white district, or for that matter, the Democrat in a Republican district, even though their electoral choices may regularly be defeated. To the extent that the vote of an individual white voter within a majority minority district has been submerged, her complaint actually is with the system of districting itself. Districting is a compromise between at-large systems in which the majority controls 100% of the political power, and proportional representation systems where voters are allowed to form their own constituencies.[11] *See Whitcomb v. Chavis*, 403 U.S. at 146-147; *Davis v. Bandemer*, 478 U.S. at 159 (O'Connor, J., dissenting). Submergence is inevitable in winner-take-all district systems because districts enhance the power of the majority, *Whitcomb v. Chavis*, 403 U.S. at 153, regardless of its race. In a system where there are only winners and losers, there is no way to moderate that power. *Davis v. Bandemer*, 478 U.S. at 159 (O'Connor, J., dissenting).

Appellants themselves readily concede that white voters have no cognizable claim to group representation as white voters. Brief of Appellants at 27, *see UJO*, 430 U.S. at 144; *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v.*

[11]In none of these systems are racial considerations likely to be extirpated from the process of forming constituencies. In the districting context, legislators will make the race-conscious designations of electoral constituencies. *Beer v. United States*, 425 U.S. 130, 144 (1976), (White, J., dissenting). Under a system of proportional representation, the voters themselves will make race-conscious decisions about the constituency to which they belong. In an at-large, winner-take-all system, the voters' race conscious decisions may allocate power in a particularly invidious way. A racial majority in a racially polarized constituency will completely submerge the minority's choices and disproportionately enhance its own. Where this is true, this Court has invalidated winner-take-all at-large constituencies. *See White v. Regester*, 412 U.S. 755 (1973); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Thornburg v. Gingles*, 478 U.S. 30.

Chavis, 403 U.S. at 124. Unless the election system is "arranged in a manner that will consistently degrade a voter's or a group of voter's influence on the political process as a whole," whites have no constitutional claim of voting discrimination. *Davis v. Bandemer*, 478 U.S. at 142-143; *UJO*, 430 U.S at 144, 165 (no cognizable claim where no "fencing out of the white population from participation in the political processes . . . and the plan did not minimize or unfairly cancel out white voting strength.").

In North Carolina, there was no claim that white voters have not been "fenced out from participation" in the political process. In fact, as we described above, white voters as a group still are overrepresented in the State as a whole. To the extent that voting and political concerns are racially polarized, the white voter within the majority minority district is "virtually represented" by, and may rely on, white representatives in other districts to protect her concerns.[12] *See UJO*, 430 U.S at 171, n.1.

[12]The concept of virtual representation is not a formulation to console losing white voters. It is a cornerstone principle of winner-take-all district representation. Virtual representation is assumed on several levels within the system. Within the district, all voters, including those who did not vote for the winning candidate are "deemed to be adequately represented by the winning candidate," *Davis v. Bandemer*, 478 U.S. at 132. Even where voters expressly did not choose the winning candidate and even in a "safe" district where the losing group loses election after election, losing voters are deemed to have as much opportunity to influence the winning candidate as anyone else in the district. *Id.* Looking at the system as a whole, moreover, as long as no group is unfairly fenced out of the political process, losing voters in any district are believed to be adequately represented vicariously by representatives of like mind in nearby districts. *See* Guinier, 14 *Cardozo L. Rev.* 1001, *supra*. This assumption breaks down where minorities systematically have been excluded and voting is racially polarized.

IV. PROHIBITING RACE-CONSCIOUS REDISTRICTING WOULD BE INCONSISTENT WITH THE FOURTEENTH AMENDMENT.

We have explained above that the view that the process of creating congressional or other legislative districts can be objective and neutral is illusory. By the very nature of the districting process, it is inevitable that a host of political considerations will affect the decisions as to where and how lines will be drawn. Protecting incumbents, ensuring districts that are safe for one party or another, compromises designed to allocate political power between competing groups and protecting various constituent groups, are but a few of the influences, often wholly unrelated to or inconsistent with the creation of compact and contiguous districts, that play a role. Inevitably, in the balancing of the various interests at work the race of voter blocs will also be a factor, directly or indirectly through proxies such as income or residency.

Of course, the invidious use of race — to exclude a minority group from meaningful participation by submerging it in a majority white district — is prohibited both by the Constitution and by the Voting Rights Act. The issue in this case, however, is whether the Constitution bans any consideration of race in order to allocate fairly representation in a legislative body or delegation by affording minority voters a reasonable opportunity to elect representatives of their choice. To make racial blindness a legal requirement for redistricting decisions would itself be inconsistent with the fourteenth and fifteenth amendments.

Consider the following hypothetical: a state legislature or redistricting commission considers race along with many other factors and draws districts *not* to achieve "proportional representation" but, as in the present case, to afford minority voters a fair opportunity to elect representatives of their choice by creating some majority minority districts. Through the initiative process, a referendum is passed amending the state constitution so as

to prohibit "the consideration of race in the creation of electoral districts or the creation of electoral districts for the purpose of providing any racial group the opportunity of electing representatives of their choice." No other restrictions are placed on the factors that may be considered in constructing districts.

Under a number of decisions of this Court, such an enactment would violate the fourteenth amendment. In *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), this Court summarily affirmed, on the authority of *Hunter v. Erickson*, 393 U.S. 385 (1969), striking down a state statute that prohibited "assign[ing] or compell[ing] [students] to attend any school on account of race . . . or for the purpose of achieving [racial] equality in attendance . . . at any school." 318 F. Supp. at 712. See also, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982)(state constitutional amendment requiring "neighborhood schools" with various exceptions unconstitutional since its purpose was to prohibit mandatory bussing for the purpose of ending racial isolation). *Hunter* itself held invalid a local ordinance that singled out fair housing laws for disfavored treatment compared to all other types of regulation of real estate transactions. See also, *Reitman v. Mulkey*, 387 U.S. 369 (1967).

The primary basis for these decisions was that the effect of the challenged laws was to "place special burdens on the ability of minority groups to achieve beneficial legislation." *Washington v. Seattle School Dist. No. 1*, 458 U.S. at 467. Thus, in *Seattle School Dist. No. 1* and *Lee v. Nyquist*, the enactments did not require neighborhood schools as a neutral principal; rather they permitted school districts to deviate from neighborhood schools for a variety of reasons *except* for the purpose of assignment based on race to achieve integration. The ordinance in *Hunter* permitted persons seeking to regulate real estate transactions to obtain legislation from the Akron City Council; only if discrimination based on race was to be prohibited was voter approval required.

Similarly, in our hypothetical, the state would be permitted to take into account a variety of different factors in drawing district lines; only taking race into account for the purpose of giving minorities a fair opportunity to elect representatives of their choice would be prohibited. Just as in the cases above, the law "would not attemp[t] to allocate governmental power on the basis of any general principle." *Hunter v. Erickson*, 393 U.S. at 395. "Instead, it uses the racial nature of an issue to define the governmental decision making structure, and thus imposes substantial and unique burdens on racial minorities." *Washington v. Seattle School District No. 1*, 458 U.S. at 470.

If it would be a violation of the fourteenth and fifteenth amendments for a state to prohibit consideration of race in drawing district lines in order to achieve a fair allocation of electoral opportunity, then, we submit, those same amendments do not prohibit such consideration. As we have demonstrated above, white voters do not suffer any harm from the drawing of majority minority districts; whites have an opportunity to elect a disproportionate number of representatives of their choice, and no one has been denied the right to vote. The Constitution does not prohibit a state from voluntarily taking actions that take race into account to benefit minorities and, indeed, the body politic as a whole; therefore it does not prohibit a state from taking race into account to ensure a proper and fair distribution of political power. In the words of Justice Frankfurter: "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Association v. Corsi*, 326 U.S. 88, 98 (1945)(Frankfurter, J., concurring).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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